Supreme Court, U.S.
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No. _____

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

ANN RICHARDS, Governor of Texas, *et al.*,
Appellants,

vs.

AL VERA, *et al.*,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS

JURISDICTIONAL STATEMENT

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October, 1994

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QUESTIONS PRESENTED

1. Whether the configurations of three Texas minority opportunity districts created to comply with the Voting Rights Act are explainable on grounds other than race, thereby making strict scrutiny improper, when parallel, more compactly shaped minority opportunity districts demonstrably could have been drawn in the same vicinity but were not for non-racial state policy reasons?

2. Whether narrow tailoring to meet the compelling interest of compliance with the Voting Rights Act requires Texas to set aside other non-racial traditional districting principles, ignore politics, and draw only those minority opportunity districts conforming to the most idealized possible version of compact shape?

3. Whether Texas congressional districts 18, 29, and 30 -- all localized, essentially single-county urban districts and all minority opportunity districts under the Voting Rights Act -- fall outside *Shaw v. Reno's* threshold test of bizarreness?

4. Whether the statewide redistricting plan creating Texas congressional districts 18, 29, and 30 is consistent with the Equal Protection Clause as interpreted in *Shaw v. Reno*?

5. Whether a consistent state tradition of incumbency protection in congressional redistricting is within the category of traditional districting principles which make strict scrutiny inappropriate under *Shaw v. Reno* if observed in a redistricting plan?

6. Whether the injury-in-fact element of constitutional standing is satisfied in an equal protection redistricting case by plaintiffs who do not claim vote dilution, who are not the object of invidious discrimination by the challenged plan, and whose only identified harm is not living in a state whose congressional redistricting plan is designed wholly without race consciousness?

7. ***Protectively, based on a cautious interpretation of remedial order language***, whether a district court exceeds its equitable powers by ordering a state legislature to enact remedial legislation by a specific date?

LIST OF PARTIES

Plaintiffs

Al Vera
Edward Chen
Pauline Orcutt
Edward Blum
Kenneth Powers
Barbara L. Thomas

Defendants

Ann Richards, Governor of Texas
Bob Bullock, Lieutenant Governor of Texas
Pete Laney, Speaker of the Texas House of Representatives
Dan Morales, Attorney General of Texas
Ron Kirk, Secretary of State of Texas

Defendant-Intervenors

United States

Rev. William Lawson
Zollie Scales, Jr.
Rev. Jew Don Boney
Deloyd T. Parker
Dewan Perry
Rev. Caesar Clark

League of United Latin American Citizens (LULAC) of Texas
Robert Reyes
Angie Garcia
Robert Anguiano, Sr.
Dalia Robles
Nicolas Dominguez
Oscar T. Garcia
Ramiro Gamboa

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS

JURISDICTIONAL STATEMENT

The Governor, Lieutenant Governor, Speaker of the House, Attorney General, and Secretary of the State of Texas (Ann Richards, Bob Bullock, Pete Laney, Dan Morales, and Ron Kirk, collectively termed "the state") appeal from the injunction of the United States District Court for the Southern District of Texas, prohibiting use of the state's 1991 congressional redistricting plan for the 1996 elections.

OPINION BELOW

The unreported opinion of the three-judge district court is reproduced in the separately bound appendix to this jurisdictional statement ("J.S. App.") at 5a-84a.

JURISDICTION

The opinion declaring the unconstitutionality of three Texas congressional districts was entered on August 17, 1994. J.S. App. 5a-84a. The subsequent remedial order of the district court, permitting use of the current congressional redistricting plan to complete the 1994 elections but enjoining its use for the 1996 elections, was entered on September 2, 1994, and amended *nunc pro tunc* on September 14, 1994. J.S. App. 1a-

4a. The state's notice of appeal was filed on September 22, 1994. J.S. App. 85a. The Court has jurisdiction under 28 U.S.C. § 1253.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution provides that "[N]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws." The relevant federal statutory provisions are sections 2 and 5 of the Voting Rights Act of 1965 as amended, 42 U.S.C. §§ 1973, 1973c, the pertinent parts of which are reproduced at J.S. App. 87a-88a. The state statute creating the congressional redistricting plan at issue is Ch. 7, 72nd Tex. Leg., 2nd C.S. (Aug. 29, 1991).

STATEMENT OF THE CASE

HB1's enactment and the first litigation wave

The national reapportionment of Congress following the 1990 census increased the number of Texas congressional seats from twenty-seven to thirty. In a second called session in the summer of 1991, the overwhelmingly white Texas legislature (the House is 78% white, the Senate, 77%) then enacted a congressional redistricting plan known as HB1, and the Governor signed it on August 29, 1991.

HB1 created two black and seven Hispanic opportunity districts under the Voting Rights Act. Black opportunity districts constitute 7% of the Texas congressional seats, while the black population in Texas equals 12% of Texas's nearly seventeen million people. Hispanic opportunity districts constitute 23% of the Texas congressional seats, and the Hispanic population in Texas is 23% of the total population.[1] The national body -- the 103rd Congress of the United States House of Representatives -- of which the Texas congressional delegation is but a part is comprised of 8.7% black members and 3.9% Hispanic members. St. Ex. 73 ¶2.

[1] Five members (17%) of the Texas congressional delegation are Hispanic.

Because HB1 established precise mathematical equality -- 566,217 people each -- among the districts, it was insulated from any possible one person, one vote constitutional challenge under the Equal Protection Clause. It cleared the hurdle of section 5 of the Voting Rights Act when it was administratively precleared by the Department of Justice on November 18, 1991.

Republican plaintiffs, however, did challenge HB1 as violative of the racial antidiscrimination prohibitions of the Equal Protection Clause and section 2 of the Voting Rights Act and of the partisan gerrymandering prohibition of the Equal Protection Clause. All these challenges failed before a three-judge federal court, both at the preliminary injunction phase and upon entry of summary judgment for the state. *See Terrazas v. Slagle*, 789 F.Supp. 828, 833-35 (W.D. Tex. 1991), *and* 821 F.Supp. 1162, 1172-75 (W.D. Tex. 1993).

Shaw*-based litigation*

Successfully clearing three different equal protection hurdles and two statutory voting rights hurdles did not insulate the state's 1991 congressional plan from further constitutional challenge. In late January of 1994, following the Court's decision in *Shaw v. Reno*, 113 S.Ct. 2816 (1993), another set of Republican plaintiffs challenged HB1. When the case went to trial only five months later, no vote dilution claims remained; the challenge was premised solely on the Equal Protection Clause as framed under *Shaw* and was leveled at twenty-four of the thirty districts.

The three-judge district court sustained the *Shaw* challenge as to three districts (CDs 18, 29, and 30), rejected it as to the other twenty-one districts, and ordered the Texas legislature to come back with a remedial congressional plan by March 15, 1995 (while letting the 1994 congressional elections be completed under HB1). This appeal is of the district court's declaration that CDs 18, 29, and 30 are unconstitutional and the associated injunction against using HB1 for Texas's 1996 congressional elections.

Targeted minority opportunity districts

Each invalidated district is a minority opportunity district originally conceived to comply with sections 2 and 5 of the Voting Rights Act. Two of the districts (CDs 18 and 29) lie wholly within Harris County in the Houston metropolitan area. The other district (CD 30) lies wholly within the Dallas metropolitan area (known as the Metroplex) and nearly 99% within the single county of Dallas.[2] The longest axis for each of these districts is 39 miles for CD 18, 43 miles for CD 29, and 42 miles for CD 30. All parts of CDs 18 and 29 may be visited in any direction in less than one hour; CD 30 is similarly accessible. Each district is served by a single television, newspaper, and job market.

These three localized urban districts are highly integrated racially. In fact, they are the three Texas districts *least* dominated by any single racial voter group. Each of the 27 other Texas districts has a higher voting age percentage of some racial group than the three invalidated as the product of racial gerrymandering. In the face of this undisputed fact, the district court nonetheless characterized the three districts' makeup as "exclusively racial." J.S. App. 76a.

Two of them (CD 18 and 30) have no racial majority in voting age population, with CD 18 having a plurality of 48.6% black voting age population and CD 30, 47.1%. Dr. Chandler Davidson explained that CD 30 has the smallest black population of any of the seventeen black opportunity districts in the eleven-state South. CD 29 has an Hispanic voting age population of 55.4% and lies in a county with a total Hispanic population of 644,935, nearly 80,000 larger than the population of a Texas congressional district and enough to form a majority in *two* districts. It is represented by an Anglo (white) incumbent who defeated an

2 Only 1.6% of CD 30's total population lies outside Dallas County itself. About three quarters of these few are in Collin County, adjoining Dallas County to the north, and the remaining quarter are in Tarrant County (whose major city is Fort Worth), adjoining Dallas County to the west. Only 29% of the 1.6% of CD 30's population lying in the two counties is black. To ease discussion, the state takes the liberty in the ensuing text of sometimes lumping CD 30 with CDs 18 and 30 in describing the three invalidated districts as "single-county" districts.

Hispanic opponent (who also was the preferred candidate of Hispanic voters) in the first Democratic primary held in the district.

A more concrete aesthetic sense of the three invalidated single-county Texas districts comes from comparing them with the congressional district which was *Shaw's* focus, North Carolina's District 12.[3] The first attachment (Att. A) at the back of this jurisdictional statement is a map drawn to scale and comparing Texas CDs 18, 29, and 30 with North Carolina District 12. The second attachment (Att. B) depicts a to-scale, identically-oriented comparison of the three invalidated minority opportunity districts with three other Texas congressional districts (CDs 6, 19, and 21), all overwhelmingly Anglo in voting age population (at 88.8%, 80.5%, and 84.2%, respectively), all encompassing both urban and rural areas, and all upheld by the district court.

While there had been a black opportunity district, originally held by Barbara Jordan, in Harris County for twenty years before the 1991 redistricting, there had been neither a black opportunity district in Dallas County nor an Hispanic opportunity district in Harris County. Thus, CDs 29 (in Harris County) and 30 (in Dallas County) were new districts coming with Texas's gain of three congressional seats.

Politics, voting rights, and shaping the districts

The politics of adding the two new minority opportunity seats to the existing 1980's congressional alignment had a profound effect on the ultimate shapes acquired by the new seats themselves and by CD 18. Independent of political forces and other pressures for maintenance of preexisting districts, more compact and idealized districts could have been drawn for a black opportunity district in Harris County, an Hispanic

3 Each of the three Texas districts is fully contiguous; none relies on the kind of double-point contiguity device used for North Carolina District 12. The origin of the district court's description of these districts as lacking contiguity, J.S. App. 62a, 71a-72a n.54, is a mystery. It certainly is not in the record which carries not a whisper about a lack of contiguity.

opportunity district in Harris County, and a black opportunity district in Dallas County.[4] The district court acknowledges this fact. J.S. App. 70a.

That such districts could have been drawn, and that the Voting Rights Act required minority opportunity districts in the two counties ultimately receiving them, was widely conceded. State Representative Grusendorf, one of the plaintiffs' two principal witnesses at trial and a Republican member of the 1991 House Redistricting Committee, testified that the Voting Rights Act, as well as fairness, required the drawing of a new black opportunity district in Dallas County and a new Hispanic opportunity district in Harris County and that more compact ones than were drawn could have been drawn. Tr. 1:99-101.

The legislative and public record reveals no critical voice of dissent on the creation of three minority opportunity districts in the two counties in question at the time the legislature considered and enacted HB1. Section 5 and its non-retrogression standard appeared to compel maintenance of CD 18 as a black opportunity district, independent of what section 2 might require.

Section 2 also seemed to compel creation of an Hispanic opportunity district in Harris County and a black opportunity district in Dallas County.[5] The previous decade's Hispanic population growth in Harris County had been phenomenal, accounting for 67.5% of the overall population growth in that, the most populous of Texas's 254 counties. The state's long history of discrimination against Hispanics, seared into the legislative consciousness by Congress's 1975 extension of section 5 coverage to Texas and through numerous section 5 objections and section

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4 The state drew such districts, and their pictures and demographics are in evidence as St. Exs. 12A, 12B, and 12C, respectively.

5 Looming over the legislature from nearly the beginning of its work on congressional redistricting and continuing through completion of the task was the *Terrazas v. Slagle* lawsuit, pre-filed in the Western District of Texas, under the legislature's noses in the state capital. One of the three targets of that suit was Texas's congressional redistricting plan, and one of the central claims was that section 2 of the Voting Rights Act required the creation of three minority opportunity districts in the vicinity and roughly similar to those ultimately created by the legislature.

2 litigation successes by Hispanic voters at all levels of Texas government, marked a path toward Voting Rights Act invalidation if an Hispanic congressional district were not created when it reasonably could be. Moreover, the legislators were intimately familiar with the racially polarized voting in Harris County which the state's expert at trial, Dr. Lichtman, documented in a fashion unrefuted by the plaintiffs' expert. Drawing a reasonably compact version of such an Hispanic opportunity district could be done within the meaning of the first factor in the *Gingles* framework, as the State's Exhibit 12B later showed and as other maps such as one prepared by State Representative Roman Martinez contemporaneously demonstrated. Against this backdrop, the legislature began work on a Harris County Hispanic opportunity district that culminated in CD 29.

The question of whether section 2 required creation of a black opportunity district in Dallas County followed a similar pattern. Major voting rights efforts, first in the 1970's and then during the 1980's round of congressional districting, to create a black opportunity district in Dallas had fallen short. With the strengthening of section 2 through the 1982 amendments to the Voting Rights Act and the availability of an additional congressional seat as a result of the post-1990 census reapportionment, the success of a section 2 suit should there be no black opportunity district created was foreordained. This, coupled with the existence of racially polarized voting in the Dallas area of the degree confirmed by Dr. Lichtman's analysis and the fact that a reasonably compact black opportunity district clearly could be created in the area, left no room for debate about the Voting Rights Act compulsion to create such a district.

Thus, the state drew three minority opportunity districts in the two counties to comply with an uncontested understanding that the Voting Rights Act compelled it. The state conceded from the beginning that it had been race-conscious in its decision to draw three minority opportunity districts, two in Harris County and one in Dallas County. It did not concede that the configuration and precise location of the districts ultimately denominated CDs 18, 29, and 30 were the products solely, primarily, or even substantially of race-consciousness. The idealized districts drawn for State's Exhibit 12 were the product of race-

consciousness and compactness. The real districts were the product of much more.

While holding to the need to meet Voting Rights Act requirements, the state had to draw real districts by taking into account other powerful historical, political, and legal factors, including the one person, one vote constitutional rule, the felt necessity (or desire) of protecting all congressional incumbents, and the closely related, historically-based principle of drawing new districts with an eye towards the interest of state senatorial aspirants for congressional office. These forces, especially incumbency protection and aiding senatorial aspirants, drove the idealized minority opportunity districts from their cores and into the shapes and configurations ultimately assumed by CDs 18, 29, and 30.

Overall, as the district court found, the state succeeded nearly perfectly in realizing its related goals of incumbency protection and aiding senatorial aspirants. No congressional incumbent of either party was paired with another, despite the addition of three new congressional districts, two in Texas's two most populous counties and one anchored in the state's third most populous county. In the 1992 election following redistricting, every incumbent save one (who had been the object of highly publicized criminal inquiries) ran and won reelection. Three former state senators ran for the three new congressional seats, and all three won.

Accomplishing this goal, however, significantly perturbed the configuration (though not the demographics) of the idealized minority opportunity districts in Harris and Dallas counties. In Harris County, two state legislators, Senator Green and Representative Martinez, were the prime aspirants for any new Harris County Hispanic opportunity district that was to be created. Their state legislative political bases lay in slightly different sectors of the county, and each began to tug and pull at the idealized district, trying to move as much of it as possible into his home territory (while still maintaining its integrity as an Hispanic opportunity district). Their tug-of-war, fired by personal political ambitions, significantly distorted the idealized district. Further complicating their effort was the two decade-old black opportunity district, CD 18. Incumbency protection compelled its maintenance, but so did voting rights law, which required it to remain a black opportunity district. Incumbency

protection blocked CD 18's movement to the south and east of its core, into the territory of CD 25, because a Democratic incumbent there wished to maintain his Democratic base. That base would be severely eroded were black voters (who vote Democratic to the order of 97%) moved into CD 18 to maintain its legal integrity as a minority opportunity district. These largely non-racial forces, combined with strict adherence to the one person, one vote rule and numerous idiosyncratic political factors, led to CD 18 and CD 29 entwining each other.

The shaping of CD 30 in Dallas primarily resulted from the efforts of two powerful Anglo Democratic incumbents, one to the east of the core of the idealized district (in what became CD 24) and one to the west (in what became CD 5), trying to hold onto as much of their Democratic political bases as they could, while still permitting CD 30's creation. The reason for this dynamic was that the idealized black opportunity district and the core of CD 30 effectively worked as a wedge driven directly into the middle of the old CD 5 and the old CD 24.

As CD 5's incumbent successfully peeled Democratic voters from the east and CD 24's incumbent did the same thing in the east, the state senatorial aspirant (then-Senator, now-Congresswoman Johnson) for what became CD 30 had to move into other Dallas territory, largely to the north, to find population for the one person, one vote rule and Democratic voters for political viability, all the while maintaining the district so as to avoid running afoul of section 2. Just as numerous idiosyncratic factors played on the shape of the Harris County minority opportunity districts, so they did in Dallas. A desire to have part of the Dallas-Fort Worth International Airport in the district led Senator Johnson to extending an arm of the district into that comparatively remote and unpopulated territory. Another arm of CD 30 extended to Grand Prairie, a primarily white Metroplex city sitting astride the Dallas/Tarrant county line, where Senator Johnson and CD 24's incumbent forcefully contended for what each viewed as friendly territory. (CD 30's Grand Prairie portion is 59% white and only 14.7% black.) Yet another loop, first to the north then back to the east, reached for two areas, one of white Jewish voters who, though not in her senatorial district, had been supportive of Senator Johnson during her political career and one of middle-class black voters with religious and social ties to the district's core.

Maps introduced by the state broke the three districts into cores and fingers in order to analyze the population and demographic make-up of the district. St.Exs. 33 (CD 30), 61A (CD 18), & 61B (CD 29). They show that the district cores are primarily minority, while the extensions from the cores are primarily Anglo.

The story of how these districts acquired their shape is complex and highly nuanced. Race was a factor, but only one among many. The districts' idealized shapes, found in State's Exhibit 12, reveal what their shape would have been had race and compactness been the only factors.

Lower court's decision

In holding CDs 18, 29, and 30 unconstitutional under the *Shaw* framework, the district court did not reject all the state's arguments. It accepted that the state successfully protected incumbents of both parties and furthered the interests of state senatorial aspirants. It accepted that these kinds of objectives had regularly informed, indeed driven, earlier Texas congressional redistricting efforts. The court also accepted that race-conscious redistricting is not in itself unconstitutional.

The court, however, held that each of the three invalidated districts was of a bizarre shape, notwithstanding their confinement to a one-county urban locale in a 254-county state which is the second largest territorially in the nation. In connection with that conclusion, the court held that the shapes of district boundaries are part of the "essence" of a *Shaw* claim. J.S. App. 53a n.40.

The court's opinion is not entirely clear on whether it requires *Shaw*-type plaintiffs to establish that race is the only factor explaining the shape of a district. Instead, it posits two poles between which lie a *Shaw* claim. At one pole is the circumstance in which the governmental entity has drawn irregularly shaped districts in an obvious effort to exclude voters based on race; at the other is the circumstance in which racial classifications of voters are made but the court's definition of "traditional" districting principles are used to make the classification. The latter is constitutionally acceptable and the former is not. J.S. App. 52a-53a. The

court places the state's efforts in CDs 18, 29, and 30 in the former, unacceptable category. In the course of reaching this conclusion, however, the court expunged incumbency protection from the approved list of traditional districting principles, J.S. App. 56a,[6] and further stated that "racial gerrymandering was an essential part of incumbency protection[.]" J.S. App. 65a.

Based upon the foregoing analysis, the court subjected the state's redistricting plan to strict scrutiny. The court begins this level of inquiry by reading *Shaw* to hold "that compliance with the Voting Rights Act might be a compelling state interest that, if narrowly tailored, would withstand . . . strict scrutiny[.]" J.S. App. 69a. The court then holds that the state satisfies strict scrutiny only if it proves that the minority opportunity districts actually drawn in the redistricting plan were required by section 2 or section 5 of the Voting Rights Act. J.S. App. 70a-72a. It holds:

> [T]o be narrowly tailored, a district must have *the least possible amount of irregularity* in shape, making allowances for traditional districting criteria.

J.S. App. 72a (emphasis added).

The court never addresses whether the Voting Rights Act reasonably could have been read by the legislature to require the drawing of three minority opportunity districts of some sort in the two counties. It makes no firm conclusions as such about the Voting Rights Act's requirements or whether they required (or reasonably could have been read to require) that three minority opportunity districts be drawn in the vicinity where they were.[7] Instead, the court skips any conclusion about

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6 There, the court states that "Shaw nowhere refers to incumbent protection as a traditional districting criterion."

7 The court does treat avoiding Voting Rights Act liability as a compelling governmental interest. J.S. App. 76a. While it is not entirely clear, there are hints in the decision that the legislature reasonably could have concluded that sections 2 and 5 of the Voting Rights Act required the creation of minority opportunity districts in Harris and Dallas counties. The plaintiffs must have read the facts, the law, and these hints

compelling governmental interest and finally concludes that CDs 18, 29, and 30, as actually drawn in the plan, are not narrowly tailored and points to the "dispositive fact that alternative plans for Districts 18, 29, and 30 were all much more geographically and otherwise logical[.]" J.S. App. 73a.

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

The Court in *Shaw v. Reno* countenanced a new, "analytically distinct" claim in the equal protection law of redistricting and voting rights. Under *Shaw*:

> [R]edistricting legislation [is unconstitutional if it] is so extremely irregular on its face that it rationally can be viewed only as an effort to segregate the races for purposes of voting, without regard for traditional districting principles and without sufficiently compelling justification.

113 S.Ct. at 2824. The Court termed this racial gerrymandering and defined it as "the deliberate and arbitrary distortion of district boundaries . . . for [racial] purposes." *Id.* at 2823. The Court held that a complaint against the North Carolina district stated a claim and sent the case back to the district court for trial.

Shaw has left much uncertainty in its wake. Questions abound about the standards for determining whether a configuration is so irregular that it implicates the *Shaw* doctrine; about the constitutional effect of the play of non-racial factors on a district's shape; about the burdens of persuasion and proof for the different *Shaw* elements; about the interplay of sections 2 and 5 of the Voting Rights Act with the *Shaw* elements; and about what constitutes narrow tailoring.[8]

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similarly to the state for the remedial plans they proffered to the court purported to create two minority opportunity districts in Harris County and one in Dallas County.

8 There are no settled expectations as a result of *Shaw*. The decision itself was on a case brought up from a dismissal for failure to state a claim. The decennial redistricting avalanche that follows the census was completed before *Shaw* and will not be repeated, except as a product of *Shaw* and lingering Voting Rights Act challenges, until half a decade from now. Thus, now is the time to correct misunderstandings that *Shaw* may have created.

Lower courts have been flooded with *Shaw* challenges and have interpreted *Shaw* in fundamentally different ways. In the congressional redistricting sphere alone, decisions in Texas (*Vera v. Richards*), Louisiana (*Hays v. Louisiana*), Georgia (*Johnson v. Miller*), North Carolina (*Shaw v. Hunt*), and California (*DeWitt v. Wilson*) have varied not only in their facts, but in their analysis of *Shaw*.[9]

The decision in the Texas case differs from the others in significant ways. It is the only case involving the invalidation of localized urban districts. It is the only case in which incumbency protection is expressly excluded from the category of traditional districting principles. It is the only case in which a preexisting minority opportunity district (CD 18) is invalidated. It is the only case in which a legislatively developed plan received neither a threatened nor actual section 5 objection and was explicitly upheld as consistent with section 2 and the Equal Protection Clause's strictures against racial discrimination and partisan gerrymandering. It is the only case invalidating more than one district.

> **I. Whether the lower court erred: (i) in holding that proof that more compact, regularly shaped minority opportunity districts could have been drawn but were not because of non-racial politics is irrelevant to demonstrating that race is not the sole or overriding reason for the irregular shape of minority opportunity districts; and (ii) in holding that, on the contrary, such proof demonstrates an inability to meet the narrow tailoring requirement of strict scrutiny?**

The largely uncontradicted facts establish that the state would have been in violation of section 2 of the Voting Rights Act had it not drawn a black opportunity district in the Dallas area and an Hispanic opportunity district in the Houston area and of section 5 of the Act had it not maintained a black opportunity district in the Houston area.

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9 The Court already has docketed appeals in three of these cases: *Hays* as No. 94-558; *Johnson* as No. 94-631; and *DeWitt* as No. 94-275.

Hypothetical districts sufficient to meet the first threshold factor of *Thornburg v. Gingles*, 478 U.S. 30 (1986), were possible.

The facts also establish that, while adhering to Voting Rights Act requirements, the state abandoned the ideal configurations of the hypothetical districts and drew what became the very real CDs 18, 29, and 30 because of raw redistricting politics. The central tenet of that politics was in 1991 what it had been throughout Texas congressional redistricting history: the protection of incumbents and the related tenet of aiding state senatorial aspirants for Congress.

Thus, non-racial real politics changed the legal ideals of *Gingles* minority opportunity districts into carefully crafted, actual districts well within the historical mainstream of Texas redistricting. The state's understanding was that it has constitutional breathing space under *Shaw* to let political reality shape legal ideals as long as the political reality is not racial.

The district court saw things differently, not so much on the facts, but in terms of *Shaw's* constitutional constraints. In fact, its reading of *Shaw* is the virtual antithesis of the state's. Resolution of this difference is a necessity if states are ever to have any sense of their constitutional obligations while drawing congressional districts that comply with their own traditions and federal voting rights and one person, one vote requirements. If redistricting is to remain what it always has been, "primarily the duty and responsibility of the State through its legislature," *Growe v. Emison*, 113 S.Ct. 1075, 1081 (1993), states must be apprised of the degree to which they are constitutionally compelled to adhere to non-constitutionally based federal judicial views about what is a legitimate traditional districting criterion, what district shapes are acceptable, and the degree to which idealized minority opportunity districts are unalterable by state policy choices.

The lower court's rationale flies in the face of *Shaw*. *Shaw* held that racial gerrymandering is the distortion of district boundaries to a degree that is explainable only on the basis of race. The lower court, on the other hand, found redistricting unconstitutional if reasons *other than race*, and outside the court's own definition of traditional districting

principles, distorted boundaries that could have been drawn for racial reasons.

Other courts have rejected this expansive reading of *Shaw* and taken the Court at its word. In the Georgia case, the court ruled that there is no racial gerrymander, and thus no occasion for strict scrutiny, "[i]f race, however deliberately used, was one factor among many of equal or greater significance" in the plan. *Johnson v. Miller*, 1994 WL 506780 (S.D. Ga. Sept. 12, 1994), slip op. at 14. In the California case, the court read *Shaw* as condemning redistricting based "solely" on race. *DeWitt v. Wilson*, 856 F.Supp. 1409, 1412 (E.D.Cal. 1994).

The question thrown into relief by contrasting the lower court's reading of *Shaw* with the California and Georgia courts' reading is critical and calls for resolution by this Court. Is a state that is under Voting Rights Act compulsion to draw minority opportunity districts simultaneously under constitutional compulsion to adhere to supposedly non-constitutional but nonetheless judicially imposed criteria in drawing the districts, even though non-racial, state-developed criteria permit the drawing of differently shaped districts? *Shaw's* words and other court rulings interpreting them answer "no;" only the lower court here has answered "yes." Whether the law of redistricting has become so rigidified -- and the state's choices so constricted -- in the wake of *Shaw* needs clarification.

II. Whether, in a statewide redistricting, localized, single-county urban minority opportunity districts with a lesser degree of single-race dominance than every other district in the state can be deemed so facially irregular that *Shaw's* threshold test is satisfied?

The contours of *Shaw's* threshold test of shape remain undeveloped and one of the decision's most puzzling aspects. This case presents a unique circumstance to the Court. All three challenged Texas districts are different in kind from the districts challenged in the three other states whose cases are either at the Court or on their way here.

North Carolina District 12 is 160 miles long and passes through 10 of the state's 100 counties. *Shaw v. Reno*, 113 S.Ct. at 2820-21. The current version of Louisiana District 4 covers 15 parishes, divides four of

the state's major cities, and is served by four media markets. *Hays v. Louisiana*, 1994 WL 477159 (W.D. La. July 29, 1994). Georgia District 11 splits 8 counties and 5 municipalities and covers four discrete, widely spaced urban centers. *Johnson v. Miller, supra*.

The Texas districts are fundamentally different. Each is a localized, single-county[10] urban district, served by a single economy and a single media market. They are the three *least segregated* congressional districts in Texas, taking racial segregation in its popular sense of single-race dominance. These characteristics are set against the backdrop of a state geographically much larger than the other three states and racially more complex because of its tri-ethnic makeup.

With resolution set at state-level, the appropriate setting for a statewide redistricting plan, CDs 18, 29, and 30 do not give the appearance of being vastly distorted, either in isolation or in comparisons. *See, e.g.*, Att. B (end of statement).

Viewed historically, the three challenged districts are not extraordinary either. In the 1960's, in the redistricting following after the advent of the one person, one rule, the Texas legislature created a district -- old District 6, sometimes termed the Tiger Teague district -- running in a narrow strand of counties from southeast of Houston through rural east Texas into bits at the southern ends of both Tarrant and Dallas counties. When compared at scale, it dwarfs CDs 18, 29, and 30 and reduces whatever in their shapes that was distasteful to the lower court to insignificance.[11]

The Court appears in *Shaw* to have rejected the position of one of the two testifying plaintiffs in this case, Mr. Chen, who stated that he

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10 Recall that barely over 1% of CD 30's population falls outside Dallas County.

11 As explained through the evidentiary trial statement of a former state senator and state Supreme Court justice, this Texas district of 30 years ago was the original spur for the comment that one could drive down the district with both doors open and kill half the people in the district. Contemporary computer technology provides the tools for more precise work in the modern era. Still, controlling for technological capability, old District 6 is a standard-setter.

views these kinds of assessments about shape as "personal judgment" as to which "[t]here is no right or wrong." Tr. 1:41. Under *Shaw*, the shape takes on constitutional significance. Nonetheless, content now must be given to this seemingly critical matter.

Shape is a contextual matter. The interplay of historical and contemporary comparisons, the degree of resolution of the viewing microscope, comparative technologies, and community location affect the description. Here, all those factors point toward a conclusion that, in any meaningful constitutional sense, the three minority opportunity districts here are not bizarre within *Shaw's* meaning. Holding otherwise threatens to enmesh the Court in redistricting inquiries from which it can never disentangle itself and for which it can never offer constitutional guidance to the trial courts.

Shaw did describe the archetype of a distorted district. It is a construct that includes "individuals who belong to the same race, but who are otherwise *widely separated by geographical and political boundaries*." 113 S.Ct. at 2827 (emphasis added). Not one of the three districts invalidated by the trial court fits the *Shaw* archetype.

While the question of what is irregular enough to pass the *Shaw* threshold is important and needs definitive resolution, the districts involved in this case fall far enough short of the threshold of bizarreness that summary disposition is possible. The comparative pictures attached to this statement, combined with both the highly integrated nature of the districts and their single-county urban character, are enough to answer that these districts do not raise a *Shaw* issue.

III. Whether an unquestioned state tradition of incumbency protection (and the related tradition of furthering senatorial aspirations) may be judicially excluded from the realm of traditional districting principles which, if followed, overcome a *Shaw* challenge?

That Texas has a long, unbroken tradition of protecting incumbents in congressional redistricting goes unquestioned by the lower court. That Texas succeeded in honoring that tradition in its 1991 congressional redistricting also goes unquestioned by the lower court.

This Court recognized and refused to "disparage" this Texas tradition over two decades ago, noting the state's interest in "maintaining existing relationships between incumbent congressmen and their constituents and preserving the seniority the members of the State's delegation have achieved" in Congress. *White v. Weiser*, 412 U.S. 783, 791 (1973). More broadly, the Court has recognized avoidance of contests between congressional incumbents and "preserving the cores of prior districts" as legitimate redistricting objectives. *Karcher v. Daggett*, 462 U.S. 725, 740 (1983).

The lower court, however, saw things differently. In the context of a *Shaw* challenge, the court removed incumbency protection from the approved list of traditional districting principles. This unprecedented step had major constitutional consequences. The court read *Shaw* to permit distorted district boundaries if they honored traditional districting principles. The court also knew that incumbency protection was a Texas redistricting tradition and that the evidence established that the prime determinant of the actual boundaries of the ultimately invalidated districts was incumbency protection. Thus, the only way to find a *Shaw* violation would be to excise incumbency protection as a legitimate state consideration. This the court did.

Its exclusion of incumbency protection was both fatal to Texas's defense and contrary to the decision in Georgia's *Shaw* congressional redistricting case, *Johnson v. Miller*, which specifically lists protecting incumbents as a traditional districting principle. Slip op. at 12. More fundamentally, it raises the troubling specter that traditional districting principles, explicitly acknowledged in *Shaw* to be a non-constitutional concept, is an infinitely manipulable judicial concept. This approach carries *Shaw* far afield from its constitutional base, and the Court should take up this question to return *Shaw* to its proper home.

Because *Shaw* makes clear that the traditional districting principles it employs as part of its constitutional framework are not constitutional in origin, and because redistricting is fundamentally a matter of state sovereignty, the only permissible source for discerning traditional districting principles is the state and its traditions and laws. The lower court disregards this fundamental tenet and converts the

concept of traditional districting principles into a highly manipulable federal judge-made rule. Wielded this way, *Shaw's* scope is vastly broadened, and the discretion given to local federal district courts is widened far outside heretofore confined constitutional banks. Nothing in *Shaw*, nothing in this Court's redistricting precedents, and nothing in the doctrine of federalism justifies the step taken by the district court.

It is crucially important to the states that the non-constitutional concept of traditional districting principles be reconfined to its origin: the histories, political traditions, and laws of the states themselves. The lower court's approach is an unjustified, unprecedented narrowing of state redistricting prerogatives.

IV. Whether the lower court erred in applying *Shaw* to invalidate the three minority opportunity districts?

This jurisdictional statement repeatedly points to the confusion the district courts have drawn from *Shaw*. Their widely varying interpretations necessarily leave conscientious state legislators adrift in trying to comply with *Shaw's* dictates in drawing congressional districts. Even within the district court decision brought before the Court in this case, the analysis is sufficiently fluid and ambiguous that the logical progression of holdings and subholdings is frequently lost.

Furthermore, the plaintiffs failed to establish much of the racial gerrymandering claim that *Shaw* assumed in the procedural posture of that appeal. They did not show that creation of the minority opportunity districts exacerbated racial bloc voting. *See* 113 S.Ct. at 2827. Nor did they show that elected representatives of the districts ignored their polity as a whole while focusing nearly exclusive attention on the minority group given an equal electoral opportunity through the district's creation. *See id.* The evidence, in fact, points in precisely the opposite direction.

To avoid the pitfalls of focusing too narrowly on what the lower court said, instead of looking at what it actually did, the state notes the importance of the situation- and fact-specific question raised by the lower court's action. Does the Equal Protection Clause prohibit a state from reacting to racially polarized voting patterns and the associated demands of sections 2 and 5 of the Voting Rights Act by drawing minority opportunity districts that are localized, single-county, and urban in

character, and that are the most racially integrated in the state, even if more idealized compact minority opportunity districts could have been drawn but were not for such non-racial reasons as incumbent protection?

Shaw raises this question but does not answer it. Answering it would be a tremendous step toward clarifying *Shaw's* ambiguous reach.

V. Whether plaintiffs who do not claim harm from a diluted vote, who have not been invidiously discriminated against, and who otherwise point to no concrete injury have standing to press an equal protection claim?

Standing is a threshold issue, a kind of constitutionally compelled docket control. *Shaw* did not address the issue of constitutional standing, and, inasmuch as implicit pronouncements on constitutional issues do not settle them, *cf. Edelman v. Jordan*, 415 U.S. 651, 671 (1974), standing remains both open and important.[12]

Despite *Shaw's* apparent premise that individualism matters in redistricting, the plaintiffs did not identify a single concrete harm which they would suffer from HB1 and the configurations of the districts in which they lived and voted. They testified to nothing indicating that HB1 subjected them to a comparative disadvantage with some real or hypothesized other person.

Blum, who lives in CD 18, indicated that "more than anything else" the abandonment of the "idea of a color-blind society" that he perceived in HB1 was the "moral reason" for his involvement. His most specific statement was that white voters are injured by such redistricting because it "polarizes us from our neighbors [and] segregates us by race." Chen, who does not live in one of the invalidated districts, testified about a series of related beliefs in equality. Orcutt, a resident of CD 30, testified to her desire to live in the adjoining district, CD 3, which is represented by a Republican congressman more aligned with her political views but emphasized that CD 30 was not a segregated district. Vera, a resident of

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12 *Shaw's* failure to substantively treat the standing issue has been described as a "remarkable departure." Karlan, *All Over the Map: The Supreme Court's Voting Rights Trilogy*, 1993 Sup.Ct.Rev. 245, 278.

CD 29, testified that he found it offensive when race is used as a redistricting factor. Thomas, a resident of CD 29, expressed "concern[]" about confusion, but later agreed that hers is a "theoretical concern" and that she does not feel personally discriminated against in the congressional redistricting process. Powers' testimony was of a similarly vague nature.

One of the three essential elements of the constitutional law of standing is that plaintiffs must establish "injury in fact," meaning that they must demonstrate some harm that is "concrete and particularized" instead of merely "conjectural or hypothetical." *Lujan v. Defenders of Wildlife*, 112 S.Ct. 2130 (1992). Generalized grievances are insufficient for standing, and the mere claim of a right to a particular type of conduct falls short of constitutional minimums. *Allen v. Wright*, 468 U.S. 737 (1984).

In *Northeastern Florida Chapter of the Associated General Contractors of America v. City of Jacksonville*, 113 S.Ct. 2297 (1993), the Court explained that, when the claim is a denial of equal protection, plaintiffs show harm by demonstrating that they face higher hurdles. Under *Northeastern Florida*, equal protection standing does not require plaintiffs also to establish that, once the hurdles were lowered, they would have cleared them and won. Critical to the *Northeastern Florida* outcome, however, was the fact that the plaintiffs there were complaining of higher hurdles in competing for a concrete benefit: municipal construction contracts. Otherwise, nothing would have differentiated the *Northeastern Florida* contractors from the contractors in *Warth v. Seldin*, 422 U.S. 490 (1975), who failed to establish that they were competing for anything.[13]

The plaintiffs in this case do not complain of higher hurdles -- or any other comparative disadvantages -- which deny them an equal opportunity to compete for something concrete. They specifically eschew any claim of vote dilution, which would be a concrete harm. They

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13 Allan Bakke's goal in *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978), was as concrete as the contractors in *Northeastern Florida*; he wanted a medical education at the Medical School at the University of California at Davis but arguably faced higher hurdles to admission. The palpability of his goal was an essential element imparting standing. *Id.* at 280 n.14.

presented no evidence that HB1 somehow stamps them with the kind of badge of inferiority that marked plaintiffs in the Court's historic equal protection cases. *See, e.g., Brown v. Board of Education*, 347 U.S. 483, 493 (1954); *Strauder v. West Virginia*, 100 U.S. 303, 308 (1879).

Striking at the public corrective (minority opportunity districts) for private discrimination (racially polarized voting), they claim harm from not living in a color-blind society and point to public reactions not private origins as the cause of their harm. *Compare Palmore v. Sidoti*, 466 U.S. 429, 431 (1984) ('[p]rivate biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect"). Nothing differentiates these plaintiffs from any other voter in the state except their highly developed sensitivity. Nothing in HB1 places the plaintiffs at a comparative disadvantage.[14]

Whether such abstract harm is enough to impart standing in the *Shaw* context is an important question with far-reaching implications. It can expose states to redistricting challenges from virtually any quarter at any time on the grounds that the redistricting plan is not color-blind enough to suit the tastes of a given voter. It carries the potential of converting the three-judge courts hearing these cases into virtual open forums for public debate on the meaning of democracy and color-blindness, untethered to the case or controversy foundation governing other kinds of cases.

This ironic result, for a function more at the center of the state's policy control than most other governmental functions, would stretch standing further than ever before. It would so divorce standing from normal understandings of the injury in fact requirement that in the thirty years since *Baker v. Carr*, 369 U.S. 186 (1962), redistricting law would have advanced from lying wholly outside federal judicial consideration to being an area only loosely bound by traditional federal jurisdictional restraints.

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[14] Comparative disadvantage is an equal protection concept. The Fifteenth Amendment might embody a different standing concept friendlier to the plaintiffs; however, they expressly abandoned their Fifteenth Amendment claim prior to trial.

Offended sensibilities were not enough for standing in *Allen v. Wright*, where the reality was racial discrimination; whether they are enough for standing under *Shaw*, where the ideal is color-blindness, will further determine *Shaw's* scope.

VI. Whether the court exceeded its equitable powers and encroached on the state's domain by exposing the legislature and its members to possible civil contempt and impermissibly confining the state's remedial options to formal legislative enactments (protectively, based on a cautious interpretation of the lower court's order)?

The district court ordered that "the Texas legislature shall develop on or before March 15, 1995, a new Congressional redistricting plan" consistent with the court's opinion invalidating three congressional districts established by HB1. J.S. App. 2a. A cautious interpretation of this language makes it an injunction to enact legislation instead of a typical remedial scheduling order giving the state an opportunity to correct a constitutional defect. This appellate point is a provisional one, premised on the precautionary reading.

As so read, the order has two basic flaws. First, it disregard voting rights precedents permitting legislative bodies to offer proposed remedial plans, to which judicial deference is owed, without using formal legislative enactments. *See, e.g., Wise v. Lipscomb*, 437 U.S. 535 (1978), *and Burns v. Richardson*, 384 U.S. 73 (1966). Second, it disregards this Court's direction in *Spallone v. United States*, 493 U.S. 625 (1990), to federal district courts to exercise extreme caution in deploying their civil contempt powers to force governments to pass legislative enactments.

By rigidifying what constitutes a legislative remedial proposal in voting rights and redistricting litigation, and by converting a rule of opportunity, *see, e.g., McDaniel v. Sanchez*, 452 U.S. 130, 150 n.30 (1981), into a rule of compulsion, the district court strayed beyond federalism's equitable bounds, and a corrective is warranted.

CONCLUSION

The Court should note probable jurisdiction. Summary reversal is appropriate on the question of whether the three districts are so irregularly shaped that further inquiry is necessary under the *Shaw*

framework; otherwise the appeal should be set down for plenary consideration.

Respectfully submitted,

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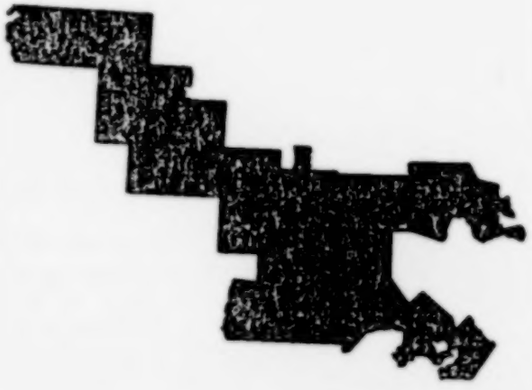
Attachment A

District 19

District 6

District 30



District 21

District 18

District 29

COMPARISON (TO SCALE) OF SELECTED CONGRESSIONAL DISTRICTS

PLANC657 DISTRICTS 6, 18, 19, 21, 29, & 30